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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Judge Billy Joe Landrum does not challenge either of the key reasons for granting certiorari presented by the Petitioner Chamber of Commerce of the United States ("Chamber"). First, Respondent does not deny that this case reflects the growing number of state courts that grant ex parte prior restraints on political speech based on claimed violations of the campaign finance laws. Indeed, Respondent's Brief In Opposition ("Opposition") boldly argues (at 9-10) that such restraints are proper simply to avoid possible voter persuasion. Nor does Respondent deny that the Mississippi Supreme Court's novel "waiver" rule—that one

who seeks emergency relief from this Court thereby forfeits its state appellate rights—impermissibly burdens the right of access to federal courts, and is inconsistent with Due Process, the Supremacy Clause and the distinctive role of this Court.

Instead, Respondent argues that this case is not a good vehicle for addressing those important issues. For example, Respondent asserts that the factual record is scanty and that, the election having passed, Respondent has little interest in obtaining additional prior restraints. But ex parte prior restraints almost by definition are based on less than complete facts: that is one important reason they should not be granted to suppress political speech just before an election. And, once an election is over, a plaintiff candidate's interest in speech suppression fades quickly. This case is typical of those that generate the need for review by this Court, and its simple record fully illuminates those issues.

Respondent's references to a recent Fifth Circuit opinion holding that Petitioner's ads did not violate Mississippi's campaign finance law is a red herring. This Petition does not ask this Court to determine the merits of the legal claims on which the ex parte prior restraint was based. Instead, this Petition presents issues that the Fifth Circuit could not and did not address:

1. Did the Chancery Court's summary order against future political speech violate the First and Fourteenth Amendments to the United States Constitution?

2. Did the Mississippi Supreme Court's ruling penalizing Petitioner's exercise of its federal right to Petition this Court by curtailing Petitioner's state appellate rights violate the Supremacy Clause of, and the Fourteenth Amendment to, the United States Constitution?

This Court is unlikely to see a better case for resolving those two important questions.

REPLY ARGUMENT

Respondent's "No Final Judgment" Argument Lacks Merit

Respondent Landrum first asserts that there "is no final judgment as required by 28 U.S.C. § 1257." (Opp'n at 6-7). The Petition explained the Chamber's reasoning as to why the action does meet the requirements of 28 U.S.C. § 1257. (Pet. at 3-4). The Opposition does not dispute any of the facts relied on by the Chamber and does not address the Chamber's related legal arguments. Instead, the Opposition merely describes the history of the case following Mississippi Supreme Court remand, showing that Judge Landrum later amended his complaint to seek monetary damages and that the amended complaint continues to pend at the trial court level. This is undisputed.

Nonetheless, the finality requirements are met for the reasons stated in the Petition. The waiver ruling raised by the Chamber's question number two is a ruling of the Mississippi Supreme Court. The mere fact that the ruling required a remand for further consistent proceedings does not prevent review; that is often the posture of cases arising from U.S. Courts of Appeals or state supreme courts that are accepted by this Court for review on petition for certiorari. *See, e.g.*, *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1279 (10th Cir. 2001), *cert. granted, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 509 (2001); *Gore v. Harris*, 772 So.2d 1243, 1247 (Fla. 2000), *cert. granted, Bush v. Gore*, 531 U.S. 1046 (2000); *Am. Radio Ass'n. v. Mobile Steamship Ass'n, Inc.*, 419 U.S. 215, 217 n.1 (1974). The first Chamber question is sufficiently final to support review as well. The temporary injunctive relief obtained was all the relief that Judge Landrum sought at the time. *See* Pet. at 3 n.2; *see also* 16 Charles Alan Wright, et al., Federal Practice and Procedure, § 3922.1 at 91-93 (2d ed. 1992) (and cases cited therein).

Notably, Judge Landrum moved to dismiss the Chamber's appeal of the TRO on lack-of-finality grounds, and the Mississippi Supreme Court denied that motion. (Pet. App. at 89a).

The Chamber's Questions Are Not Moot

Respondent Judge Landrum argues that the prior restraint question raised by the Chamber is moot. He makes no such argument as to the waiver issue. His argument on the prior restraint question first contends that the speech which prompted Judge Landrum to seek the TRO in this case will not be repeated, because he will not run for the Mississippi Supreme Court again.[1] Judge Landrum goes on to represent that he is running for re-election to the Circuit Court and "there is no claim by the Chamber that it will make any expenditures against him in the race that might conceivably cause him to seek injunctive relief of the kind he sought here." (Opp'n at 8). This plainly suggests that, if the Chamber were to run ads that displeased Judge Landrum, he might seek injunctive relief against them.

Respondent also argues that "there is no reasonable likelihood that a case remotely similar to this one would arise," (Opp'n at 9) because "whether the Chamber can or can not run similar ads in the future" will be clarified through the

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[1] Respondent's statement that "he has no current stake in the debate over the legality of the TRO" (Opp'n at 8) is belied by the fact that he currently has an amended complaint for a permanent injunction against the Chamber pending in federal district court (Pet. App. at 166a-167a). Another instance in which the Respondent's presentation is less than forthcoming is his statement that the Chamber removed the case to federal court by "relying on the same diversity of citizenship grounds that have always existed" (Opp'n at 7). However, diversity only existed after Respondent dismissed several Mississippi television stations in his amended complaint (Pet. App. at 164a) that were included in his original complaint (Pet. App. at 53a).

Moore v. Chamber of Commerce litigation [2] and "everyone will comply with the law" (Opp'n at 9).[3] That litigation will resolve whether the Chamber advertisements run in 2000 in Mississippi merit First Amendment protection under the express advocacy standard established by *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). However, it always will be possible for partisans to contend that future ads constitute express advocacy or fail to meet whatever other standard may then define the outer limit of First Amendment protection of political speech from state regulation.

Unless this Court makes clear that TROs and other forms of summary injunctive relief are *not* appropriate remedies for redressing objections to political ads, the Chamber surely will face similar cases in the future. Nowhere does Respondent suggest his acceptance of the principle that such TROs or other similar prior restraints are not appropriate remedies for courts to employ when the ad appears to involve express advocacy or when that issue is genuinely disputed.[4] Consequently, this presents a classic example of a case that is

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[2] *Moore v. Chamber of Commerce*, 288 F.3d 187 (5th Cir. 2002), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Aug. 26, 2002) (No. 02-305). The Chamber opposes this Court's taking review in that case, because the Fifth Circuit correctly understood and applied the express advocacy standard.

[3] Such guidance might also have been provided by the Mississippi Supreme Court in the present case, but for its waiver ruling that is challenged by the Chamber's Petition, or in a companion appeal of a similar prior restraint that the Mississippi Supreme Court summarily dismissed by Order dated July 26, 2002.

[4] The Chamber submits that candidates will always desire summary injunctive relief from political speech that they perceive to be harmful to their interests. However, there is hope that, following appropriate guidance from this Court, the lower courts will resist yielding to such candidate requests.

"capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), and, therefore, is not moot.

The Questions Posed Do Not Lack Sufficient "Concreteness"

Respondent also contends that the Chamber seeks review "in a context totally devoid of facts (because the case came up on a TRO)" (Opp'n at 10-11) and the "prior restraint question posed by petitioner lacks the concreteness that should exist before the Court undertakes to decide such an important constitutional issue" (Opp'n at 11). The absence of a more developed record is not a valid reason for declining to take review here. Prior restraints on political speech are typically entered on the basis of a scant factual record and minimal judicial consideration. Indeed, the present case may involve a fuller record than most. Here, the Chamber had brought in another court a declaratory judgment action against the Mississippi Attorney General. That litigation produced a decision and extensive opinion by U.S. District Judge Wingate that the ad to which Judge Landrum objected constituted express advocacy, and, therefore, was subject to the Mississippi campaign finance disclosure statutes. Respondent Judge Landrum's request for injunctive relief relied exclusively on Judge Wingate's opinion and Judge Landrum's perception that the ad was injurious to his candidacy. (Pet. App. at 54a). If, as the Chamber contends, the First Amendment protects the Chamber from prior restraints in those circumstances, then the Chamber and other political speakers will also be protected in the more common circumstance where there has been even less judicial examination of the ad.[5]

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[5] The Chamber's position is that the First Amendment protects against courts entering injunctive prior restraints even where an ad does constitute express advocacy.

Respondent does not make clear what fact he believes to be missing from the record that makes this case inappropriate for a writ of certiorari. He poses a hypothetical, however, that may suggest his thinking. He argues that there is "no decision of this Court that would clearly and absolutely foreclose" injunctive relief where "massive illegal expenditures resulted in a very close victory for one candidate over another" (Opp'n at 10).[6] This case does not present that situation,[7] and the Chamber does not seek through this Petition a ruling that purports to address unrelated hypothetical situations. The Chamber seeks only a determination as to the lawfulness of prior restraint in the circumstances of this case. Nevertheless, given the increasing occurrence of prior restraints on political speech (Pet. at 17-18), the Court could grant the writ and address the concerns inherent in Respondent's hypothetical.

The Waiver Issue Does Involve An Important Claim of Right

Respondent's final contention is that the Chamber's second question "does not provide a basis for review." (Opp'n at 11). First, Respondent speculates that the new waiver rule may have been imposed only because "the Chamber deliberately by-passed the Mississippi Supreme Court in seeking a stay" (Opp'n at 11-12), and the rule "may well be applicable only to the Chamber in this case" (Opp'n at 12).

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[6] It would seem unlikely that any candidate could establish prior to the election that ads which had, or had not yet, been run actually would change the outcome of the election.

[7] Judge Starrett, the candidate referred to favorably in the Chamber's ad that Respondent requested be restrained, lost the election. Moreover, the Chamber did not make "massive illegal expenditures." Judge Wingate's decision found only that the ads were subject to the Mississippi reporting statute. In that declaratory judgment action, no party alleged that the Chamber expenditures were unlawful under Mississippi law, and Judge Wingate made no finding that they were.

That interpretation, which is narrower than the language of the Mississippi Supreme Court's Order,[8] would not render the waiver rule unimportant. So far, this Court is the only Court in which the Chamber has been able to secure timely judicial relief from prior restraints on Chamber political speech.[9] Absent effective guidance to the lower courts, the Chamber may well have to invoke the same procedure in the future.

Respondent also asserts that the Chamber's objection to the waiver rule "does not claim any legal right" (Opp'n at 12).[10] That assertion is erroneous. The Chamber is seeking to maintain the right to have its merits appeal to the Mississippi Supreme Court decided on its merits. Ruling on the arguments briefed by the parties could have vindicated the Chamber rights asserted there. The right to appeal within the state court system is very important to the Chamber, like other litigants. The Chamber's challenge to the waiver rule seeks directly to protect that right.

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[8] The Order states: "After due consideration, we find that the Chamber waived its right to appeal this case to this Court when it chose to file a motion to stay state court proceedings with the United States Supreme Court." (Pet. App. at 1a).

[9] As noted in the Petition (at 8), the Mississippi Supreme Court had denied, three days earlier, the stay application made by the Chamber with respect to another prior restraint order that relied on Judge Wingate's decision (Pet. App. at 49a). It can hardly be argued, as Respondent does (at 11-12), that the Chamber "deliberately by-passed the Mississippi Supreme Court in seeking a stay" of the prior restraint that is the subject of this Petition. It would have been futile for the Chamber to wait for the Mississippi Supreme Court to again deny an identical stay application involving a different plaintiff.

[10] The Opposition also suggests that the waiver "may well constitute an adequate state ground for decision." (Opp'n at 12). However, the Opposition notes no prior source of that rule in Mississippi law and presents no rebuttal to the Petition's demonstration that such a state court rule would run contrary to this Court's Supremacy Clause and Due Process decisions. (Pet. at 19-21.)

CONCLUSION

For the reasons discussed above and demonstrated in the Chamber's Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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